STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

Commonwealth Edison Company	**:**	
	:	
	:	**Docket No. 14-0567**
Reconciliation of revenues collected under	**:**	
Rider EDA with the actual costs associated	**:**	
With energy efficiency and demand	**:**	
Response programs.	**:**	

REPLY BRIEF OF THE STAFF OF THE ILLINOIS COMMERCE COMMISSION

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Staff of the Illinois Commerce Commission ("Staff"), by and through its counsel, pursuant to the direction of the Administrative Law Judge ("ALJ") and Section 200.800 of the Illinois Administrative Code (83 Ill. Adm. Code 200.800), respectfully submits its Reply Brief ("Staff RB") in the above-captioned matter.

I. INTRODUCTION

Staff and Commonwealth Edison Company ("ComEd" or "Company") filed their collective Initial Briefs ("IBs") on February 11, 2016. Some of the issues raised in the Company's IB were addressed in Staff's IB and, in the interest of administrative efficiency, Staff will not repeated every argument made or position taken during this proceeding. Except where expressly noted herein, Staff maintains its position as set forth in its IB.

II. ARGUMENT

A. Recovery of Costs Under a "Pay-for-Performance" Contract, Where the Vendor Failed to Perform, Should Come from the Vendor rather than Ratepayers

The Company seeks to recover from ratepayers the costs associated with two underachieving energy efficiency and demand response programs administered by the same third-party vendor. That vendor, One Change, became insolvent and as a result did not fulfill its contractual obligations in the program year being reconciled here ("PY6"). As the Company clearly lays out in its IB, following Commission approval of the overall 2013 IPA procurement plan, ComEd negotiated the contracts to implement those programs with third-party vendors (ComEd IB, 9); ComEd negotiated what it calls a "pay-for-performance" structure for each contract (ComEd IB, 10); ComEd executed said "pay-for-performance" contracts with its vendors (ComEd IB, 11); and ComEd paid the vendors under the terms of those contracts (ComEd IB, 13). ComEd admits several times in its IB that the "pay-for-performance" structure it chose for its contracts was driven by the Commission's directive to protect customers from the vendor's inability to achieve the required savings. (ComEd IB, 10, 13.) There is no dispute over these facts.

The first program, Project Porchlight, underachieved the requisite kWh savings by 27.5% according to the independent evaluator. Under the terms of One Change's contract with ComEd, One Change is obligated to refund back to the Company this same percentage of the costs paid in advance to One Change. The second program, Small Commercial Power Strips, was a program due to be implemented in the following program year ("PY7"), for which the Company paid start-up costs to One Change in PY6. As with the Project Porchlight program, the Small Commercial Power Strips contract was structured on a "pay-for-performance" basis and, because there were no achieved kWh savings, all of the money paid to One Change is due back to ComEd. (Staff IB, 3.) It is undisputed that One Change owes ComEd a refund.

Despite these uncontested facts and terms of the contracts, ComEd now seeks to recover these costs from its customers through its Rider EDA because it is unable to recoup them from One Change, the now-insolvent contractor. What is at issue is whether ratepayers can be made to pay for the failure of a vendor to perform in accordance with the terms of the contract between ComEd and One Change, when ComEd alone decided how the contracts would be structured and that structure failed to protect its customers from the contractor's failure to perform.

The Company notes that Staff and various intervenors in the 2013 IPA procurement docket reviewed the plan, and that it was approved by the Commission. (ComEd IB, 10-11.) This is true. The Company's statement that "ComEd then executed the pay-for-performance contracts as ordered by the Commission and subsequently paid the vendors under the terms of those contracts" is, however, misleading. (ComEd IB, 13.) The Commission ordered the programs be approved; the Commission did not order ComEd to structure its "pay-for-performance" contracts to pay costs up-front without safeguards against the risk of non-performance and insolvency. ComEd acknowledges that the contracts were structured, negotiated, and executed after Commission approval of the programs. (ComEd IB, 9-11, 13.) The Commission approved programs to be implemented by third-party vendors under pay-for-performance contracts in order to protect ratepayers. As pointed out in Staff's testimony and IB, however, ComEd's contracts were not actually "pay-for-performance" contracts, where payment is dependent on performance. Rather, these contracts were essentially structured as "pay-prior-to-performance."

The Company itself states that its "involvement was limited to the contract manager role." (ComEd IB, 10.) As the "contract manager," ComEd has an obligation to ensure that the terms of the contract are enforced; that is, that costs stemming from programs that underachieve the requisite kWh savings are recouped from the vendor. ComEd repeatedly stated that its purpose in structuring the contracts as it did was to protect customers. (ComEd IB, 10 ("[t]his structure is designed to *protect customers* from a vendor's failure to perform by requiring the vendor to give back funds in proportion to any shortfall in promised kWh savings…") (emphasis added); 13 ("pay-for-performance contract structure is itself a best practice and prudent *means of protecting customers* by ensuring that vendors perform as promised and refund any shortfall) (emphasis added).) While a true "pay for performance" contract – by which a contractor would be paid for actual performance – would have protected customers, ComEd's contracts did not. In paying One Change prior to performance, ComEd assumed the risk that the contractor would not perform and that the Company would then be obligated to seek reimbursement from the contractor. Inherent in that risk is the risk that the Company would be unable to collect reimbursement. As the contract manager, ComEd failed to structure its contract to safeguard against that risk, failed to enforce the terms of the contract, and accordingly, the costs should not be passed on to ComEd's customers.

Throughout its IB, the Company incorrectly argues that Staff suggests only that ComEd should withhold vendor payment until the final evaluation report has determined the achieved energy savings. (ComEd IB, 3; 8-9; 13-14.) That is patently false. Staff noted a number of alternatives available to ComEd, any one of which would have prevented the current situation of trying to collect a refund from a non-performing vendor. (ICC Staff Ex. 2.0, 7.) Staff witness Scott Tolsdorf provided additional options that were available to ComEd in structuring the contracts, such as requiring performance bonds or inclusion of a holdback provision. Id. The fact that ComEd failed to take any actions to eliminate this risk does not negate the fact that the terms of the contract specify that recovery of these costs is due to ComEd from the vendor.

B. The Commission's Decision in Docket No. 15-0541 is not Relevant

In an attempt to obfuscate the issues here, the Company improperly refers to the Final Order in the 2016 IPA Procurement Plan, Docket No. 15-0541, as having resolved the outstanding issues in this proceeding. (ComEd IB, 14.) In fact, what the Commission Order stated was just the opposite:

> The Commission also did not consider matters in another Commission proceeding, Docket No. 14-0567. Issues presented in that proceeding will be resolved in that case.

Illinois Power Agency, ICC Order Docket No. 15-0541, 111 (December 16, 2015). The Commission declined to resolve the outstanding issues in the instant proceeding in the 2016 IPA procurement docket. The facts and circumstances of this matter were neither presented nor resolved in Docket No. 15-0541. The Commission's decision in the 2016 IPA procurement docket was not based upon the merits of Staff's arguments made in the instant case, but rather the fact that this reconciliation docket was the more appropriate setting to consider the failings of individual programs. ComEd relies upon the Commission's determination in the 2016 IPA procurement plan that utilities shall not be required to withhold payment and disallow costs for under-performing programs as support for rejection of Staff's recommendation in the present docket. (ComEd IB, 14.) However, Mr. Tolsdorf never recommended in the instant proceeding that the Commission order future payments to vendors be withheld until verification of energy savings. Rather, Mr. Tolsdorf recommends that the Commission disallow costs for two specific programs, where the terms of the contract were not fulfilled by the vendor and ComEd failed to adequately structure the contracts to protect customers. The 2016 IPA Procurement Plan Order specifically stated that the issues in this case should be resolved in *this docket*. Moreover, the recommendations made by Staff witnesses in that docket are not identical to the recommendations made by Mr. Tolsdorf in the instant case. Accordingly, the Commission should take action based upon its review of the facts and circumstances presented here, and not in Docket No. 15-0541.

C. Staff's Proposals for "Pay-for-Performance" Contracts are Reasonable

ComEd argues that Staff's proposal is "an attack on the General Assembly's third-party IPA energy efficiency programs" (ComEd IB, 4), "an extreme reaction to the lone vendor insolvency to occur in eight year [sic] of offering energy efficiency programs" (ComEd IB, 3; 14), and would have a "chilling effect" upon IPA energy efficiency programs (ComEd IB, 3) or even effectively dismantle those programs (ComEd IB, 14). These arguments, to put it charitably, considerably overstate the case, and verge on hyperbole; in any case, they should be rejected. Staff recommends simply that the Company be required to enforce the contracts which, by its own admission, ComEd negotiated, structured, and executed with its vendors. The contracts state that the vendor – not customers – are responsible for the costs of the program where the vendor fails to achieve the required kWh savings. Accordingly, these costs should not be recovered from ratepayers.

III. CONCLUSION

Staff respectfully requests that the Illinois Commerce Commission approve Staff's recommendations in this docket.

Respectfully submitted,

__/s/____________________

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